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IN THE

Supreme Court of the United States

October Term, 1971

No. 71-897

NEW YORK DISTRICT COUNCIL NO. 9, INTERNATIONAL BROTHERHOOD OF PAINTERS & ALLIED TRADES, AFL-CIO,

Petitioner,

—v.—

NATIONAL LABOR RELATIONS BOARD,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONER'S REPLY BRIEF

IRWIN M. ECHTMAN
Counsel for Petitioner
6 East 39th Street
New York, New York 10016
(212) MU 3-5516

HENRY J. EASTON
Of Counsel

COUNSEL PRESS, INC., NEW YORK, N. Y.

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In its brief in opposition, the National Labor Relations Board states that the question here presented is whether the substantial evidence test is met, basing this position wholly on petitioner's acts of picketing. Such an approach excludes the significance to the constitutional issue advanced by petitioner of the communications which petitioner-union transmitted to the Board of Education.

If the Decision of the National Labor Relations Board had been based on the picketing alone, the concession made below that such picketing was in compliance with the *Moore Dry Dock* standards would have been dispositive of the issue. However, the Decision went further and attributed

objectives to petitioner in the light of the latter's communications to the Board of Education. The question here presented, therefore, is whether the union's appeals contained in those communications are expressions of its constitutional right to petition a governmental agency and, if they are, whether such protected expressions may serve as a basis for holding that picketing in connection with a primary labor dispute constitutes a violation of the statute because the objectives of such picketing had been thus "foretold" in the course of the petitioning (A-35).

On Page 7 of its brief, the National Labor Relations Board speaks of its finding "that petitioner picketed the Board of Education . . . to compel it to cease doing business with Delta. . . ." However, there was no such affirmative finding. There were only findings of the union's picketing "*at* P.S. 228" (emphasis supplied; A-16, 28, 31, 37). Furthermore, the Board's findings, all made by its adoption of the Trial Examiner's findings, include the finding that the language of the picket signs was expressly directed at Delta, the primary employer, and made no reference whatsoever to the Board of Education (A-29, 37); and that the picketing did not induce or encourage employees of the Board of Education to engage in a work stoppage, nor did it have such a "necessary effect" (A-37-38. See also dissenting opinion of Board Member Brown, A-5-6). It is evident from these findings that the National Labor Relations Board could not have found and did not find that the union's picketing of Delta constituted picketing of the Board of Education itself.

Petitioner contends that since it did not picket the Board of Education but only the employer with whom it had a primary dispute, the gravamen of the decision below could only have been the union's communications to the Board of Education; and that even if those communications could be construed as having threatened, coerced or restrained the Board of Education with an object of causing

it to cease doing business with Delta, under the circumstances of this case such communications were an expression of petitioner's right to petition a governmental agency and were within conduct protected by the First Amendment. See *National Labor Relations Board* v. *Fruit and Vegetable Packers*, 377 U.S. 58 (1964).

Respectfully submitted,

IRWIN M. ECHTMAN
Counsel for Petitioner

HENRY J. EASTON
Of Counsel

March, 1972.